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Case No. 90-

IN THE

Supreme Court Of The United States

RICHARD COFFEE,

Petitioner

v.

SEABOARD SYSTEM RAILROAD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In an action under the Federal Employers' Liability Act, can a railroad which sends its employees to work on sidetracks avoid its duty to provide those employees with a reasonably safe place to work by delegating the maintenance of those sidetracks to third parties?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Plaintiff-Petitioner, Richard Coffee, in accordance with Rule 28.1 of the Supreme Court of the United States, certifies that the following listed parties have an interest in the outcome of this case.

1. Seaboard System Railroad, Inc.
2. CSX Transportation, Inc.
3. Jessie Morie Sand Industry
4. Richard Coffee.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard Coffee, respectfully requests that this Court grant his petition for writ of certiorari seeking review of the judgment of the Supreme Court of Alabama dated March 30, 1990, and made final on May 18, 1990.

OPINIONS BELOW

The Opinion of the Supreme Court of Alabama has not been released for publication in the official reporter; however, the Opinion is reproduced at Pages A-1 through A-6 of the Appendix hereto.

JURISDICTION

This action is brought pursuant to the provisions of the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq.*

The Supreme Court of Alabama rendered its opinion in this case on March 30, 1990. On May 18, 1990, the plaintiff's application for rehearing was denied without opinion by that Court.

This Court has jurisdiction to review this case on Petition for Writ of Certiorari pursuant to the provisions of 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

SECTION 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death, of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or

foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

SECTION 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

SECTION 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any cause where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

STATEMENT OF THE CASE

Richard Coffee worked as a brakeman for the Seaboard System Railroad. He had done this work for most of his life.

In early 1982, Coffee began working on a train which performed railroad switching operations between Fitzgerald, Georgia and Manchester, Georgia. Coffee and his crew members would drop off or pick up railroad cars from various industries between Manchester and Fitzgerald and would perform other switching operations at those industries according to railroad instructions.

Jessie Morie Sand Industry [Jessie Morie], in Brown Sand, Georgia, was one of the industries which Coffee and his crew worked. Over a period of time, the roadbeds, track area, and walkways adjacent to the tracks at Jessie Morie had been allowed to deteriorate into an extremely dangerous condition. A fine silica sand had been allowed to accumulate on the tracks and areas adjacent to the tracks to such an extent that Coffee's train on occasion could not utilize the tracks without risk of derailment and Coffee and his crew often found themselves switching moving railroad equipment while standing in sand over their ankles.

Coffee and his fellow railroad workers had repeatedly reported this dangerous condition to the railroad. The railroad readily acknowledged the condition and the danger. However, nothing was done. The reason for the railroad's inaction is that they had entered into an agreement with Jessie Morie which purported to delegate the responsibility for maintaining the railroad tracks and keeping the railroad right of way free of debris to Jessie Morie.

On July 11, 1982, Coffee and his crew arrived at Jessie Morie with instructions to switch it. As Coffee attempted to dismount from a railroad car, his leg sank into the sand and struck an iron tool which was buried in the sand. Coffee suffered serious orthopedic injuries to his knee. Reconstructive surgery and rehabilitation were unsuccessful. Coffee is permanently disabled.

Coffee brought an action pursuant to the provisions of the Federal Employers' Liability Act in the Circuit Court of Jefferson County, Alabama. Coffee alleged that the railroad had negligently failed to maintain the tracks and areas adjacent to the tracks at Jessie Morie and had negligently failed to provide Coffee with a reasonably safe place to work.

At the trial of this case, the judge instructed the jury that the railroad had a *nondelegable* duty to provide its employees with a reasonably safe place to work. The trial court instructed the jury that any negligence of Jessie Morie in failing to maintain the tracks under its contract with the railroad would be imputed to the defendant railroad.

The jury returned a verdict in favor of the plaintiff in the amount of $1,554,000.00.

On appeal, the Alabama Supreme Court reversed the trial court and held that the negligence of Jessie Morie in failing to maintain the sidetrack was not an activity that could be imputed to the railroad.

On May 18, 1990, the Alabama Supreme Court denied Coffee's application for rehearing.

Coffee now files this Petition for Writ of Certiorari.

REASON FOR GRANTING THE WRIT

In its decision in *Coffee,* the Alabama Supreme Court has effectively allowed a railroad to delegate the responsibility of maintaining the safety of railroad sidings to third parties and thereby avoid what has heretofore been considered the nondelegable duty of a railroad to provide a safe place for its employees to work. This decision is not only in direct conflict with the decisions of the Federal Appellate Courts, but it flies in the face of the most fundamental precepts of the Federal Employers' Liability Act.

The inconsistency of the Alabama Supreme Court's decision in this case can best be illustrated by comparing *Coffee* with the decision of the Sixth Circuit in *Payne v. Baltimore & Ohio Railroad Co.,* 309 F.2d 546 (6th Cir. 1962),

cert. denied, 374 U.S. 827 (1963). The two cases are factually indistinguishable. Payne, like Coffee, was employed as a brakeman for the railroad. Payne, like Coffee, was riding on the side of a box car on a spur track owned by a third party. Payne's employer, like Coffee's employer, had entered into a sidetrack agreement with the third party (SUCO) in which the third party (SUCO) agreed to maintain the track. Payne was killed when his box car derailed as a result of an accumulation of ash on the rails and roadbed. Coffee was injured as a result of an accumulation of sand and debris on the track and roadbed. Obviously, the factual similarities are remarkable. The legal conclusions, however, are exactly opposite.

The Sixth Circuit succinctly outlined the legal issue it confronted in *Payne*, and which the Alabama Supreme Court has recently confronted in *Coffee*, as follows:

> Can the existence of a contract between defendant and SUCO have the affect of relieving the defendant from this duty? Can defendant successfully maintain that since it was the duty of SUCO under the terms of the contract to maintain the spur track that SUCO's negligence in failing to properly maintain it was not imputable to the defendant? We think not.

309 F.2d at 549. The *Payne* court made it clear that the negligence of the third party in maintaining the spur track was properly imputed to the defendant railroad. The basis for the Court's decision was the fundamental proposition that the railroad's duty to provide its employees with a safe place to work is nondelegable. The Court explained:

> [The] defendant may not legally delegate to another its duty to its employee, and thereby escape liability to such employee. This is the basis for the FELA. If defendant does delegate and relies upon the services of its agent to carry out its own duty, it may not shift liability from itself to said agent when an employee seeks to hold it

> directly liable. Under FELA the employer is the one owing the duty to the employee. The employee need not look elsewhere for his protection. He has a right under FELA to rely on his employer and none other. When the employer delegates his duty or abdicates its control, the employer takes the risk, not the employee.

309 F.2d at 549.

The Alabama Supreme Court in *Coffee* reached the completely opposite result. Indeed, in its decision, the Alabama Supreme Court reversed a trial court for charging the jury in accordance with the principles outlined in *Payne*. In effect, the Alabama Supreme Court held that the railroad *could* delegate its duty by contract to the third party and that the third party's negligence was not properly imputed to the railroad. Obviously, there is an irreconcilable conflict between the Sixth Circuit and the Alabama Supreme Court.

How is it possible for two appellate courts to reach exactly opposite results under such identical circumstances? Actually, this conflict is quite understandable for several reasons. First, this is an area of the law which has been plagued with ambiguity and uncertainty for many years. Indeed, nearly fifty years ago the United States Court of Appeals for the Sixth Circuit lamented over the confusion surrounding agency questions under the Federal Employers' Liability Act when it stated:

> We are here dealing with a legal problem so difficult that law writers were unclear and perplexed about it long before we came on the scene and no doubt they will continue after we have gone.

Cimorelli v. New York Central Railway Co., 148 F.2d 575 (6th Cir. 1945). Second, it has been nearly twenty-five years since this Court has given the lower appellate courts guidance on this issue, in spite of growing confusion. Much of the confusion is caused by seemingly inconsistent opinions issued by this Court thirty years ago. Petitioner re-

spectfully submits that it is time for this Court to revisit these decisions and provide guidance to the lower appellate courts so that mistakes such as *Coffee* can be avoided in the future.

The fundamental rationale for imputing the negligence of third parties to a railroad in an action under the FELA was adopted by this Court in *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958). In *Sinkler*, the Missouri Pacific Railroad had contracted with the Belt Railway Company for the Belt Railway to perform certain switching operations for the Missouri Pacific. Sinkler, a Missouri Pacific employee, was injured when Belt Railway employees negligently performed a switching maneuver. Sinkler sued his employer, the Missouri Pacific, under the FELA. This Court, in holding that the Missouri Pacific was responsible for the negligence of the Belt Railway, adopted what has become known as the "operational activities under contract" analysis. This Court held that "when a railroad employee's injury is caused, in whole or in part, by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of Section 1 of FELA". 356 U.S. at 332.

In adopting its operational activities analysis, the *Sinkler* court expressly noted its desire to give "an accommodating scope" to the word "agents" under the FELA. Subsequent decisions proved to be extremely accommodating. Thus, in *Hobson v. Texaco, Inc.*, 383 U.S. 362 (1966), this Court held in a Jones Act case (which incorporates FELA by reference) that a taxi driver carrying an ill employee to the hospital was engaged in an operational activity and thus the taxi driver's negligence was imputed to the ship owner. The lower courts have imputed the negligence of a third party to the railroad on a very liberal basis in a broad variety of activities. For example, in *Carter v. Union Railroad*, 438 F.2d 208 (3rd Cir. 1971), the negligence of a third party in maintaining a parking lot was imputed to the railroad. The negligence of a YMCA housing railroad

employees over night has been imputed to the railroad. *Carney v. Pittsburgh & Lake Erie Railroad Co.*, 316 F.2d 277 (3rd Cir.), *cert. denied*, 375 U.S. 814 (1963). The negligence of a cafeteria where railroad employees ate was imputable to the railroad. *Moore v. Chesapeake & Ohio Railway Co.*, 649 F.2d 1004 (4th Cir. 1981). All of these case affirm the basic proposition that the railroad's duty to its employees is nondelegable, and the railroad would be held responsible for the actions of those third parties to whom it attempted to delegate such duties.

The confusion in this area arises from the decision of this Court in *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960). Ironically, the issue in *Ward* had nothing to do with whether or not the negligence of a third party would be imputed to the railroad. Rather, it concerned the more fundamental question of whether or not the injured plaintiff was an "employee" within the meaning of the FELA and thus entitled to bring an action under that Act. The *Ward* court utilized a *Sinkler* analysis, even though the Court in *Sinkler* had expressly cautioned that the issue of who was an employee was entirely different from the question of who was an agent. *Sinkler, supra*, 356 U.S. at 331 (footnote 5). Without heeding its previous caution, this Court paved the way for the confusion that has followed by suggesting that the maintenance of a side track by a third party industry should not be considered as being within the operational activities of a railroad. *Ward*, 362 U.S. at 397-98.

How can *Ward* be reconciled with *Hobson*? Can it legitimately be said that a railroad employee should expect greater protection from the FELA when he was riding in a taxicab after hours than when he is actually switching box cars during the course of his daily work? How can it be rationally suggested that a railroad is responsible for the condition of a hotel or cafeteria used by its employees yet it is not responsible for the condition of the very railroad tracks upon which it sends its employees out to do their daily work?

Some courts have attempted to reconcile these glaring inconsistencies. In *Empey v. Grand Trunk Western Railroad Co.*, 710 F.Supp. 653 (E.D. Mich. 1987), *aff'd*, 869 F.2d 293 (6th Cir. 1989), the Court considered whether the negligence of a hotel should be imputed to the railroad where a railroad employee was injured while spending the night at that hotel. That Court tried to distinguish *Ward:*

> Under facts similar to those in *Ward*, the Sixth Circuit **did** impute the negligence of a third party to the railroad in *Payne*. Unlike *Ward*, however, the *Payne* court did not impute negligence to the railroad based on the third party's performance of "operational activities". Nor could it in light of the Supreme Court's ruling in *Ward* to the contrary. Rather, the *Payne* Court imputed liability by extending the nondelegable duty standard enunciated by the Supreme Court in *Shenker v. Baltimore & Ohio R. Co.*

[emphasis in original] 710 F.Supp. at 662. The Court went on and explained:

> Thus, it appears that the nondelegable duty standard as construed in *Payne* reaches farther than the "operational activities" doctrine of *Sinkler* in its ability to impute negligence of a third party to a railroad. *Payne*'s liberal interpretation of the nondelegable duty standard is not inapposite to the policy concerns underlining the Supreme Court's expansion in *Sinkler* of the class of those whose negligence may be imputed to a railroad.

710 F.Supp. at 663.

On appeal, the Sixth Circuit affirmed the District Court in 869 F.2d 293 (6th Cir. 1989). In its opinion, the Sixth Circuit likewise attempted to establish a broader rationale for imputing negligence to a third party than did *Sinkler*. The Court stated:

> In *Shenker v. Baltimore & Ohio R. Co.*, the Supreme Court examined a different rationale for

> imputing a third party's negligence to a railroad company under the FELA . . . [T]he court approved of "the more broad proposition" that a railroad has a nondelegable duty "to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control".

[citations omitted] 869 F.2d at 296.

Did *Shenker* establish a broader rationale for imputing negligence to a third party than the operational activities doctrine of *Sinkler*? Has this "more broad proposition" overruled the language in *Ward*? Or is *Ward* being erroneously applied by the lower courts to agency questions when it was always intended to apply only to the question of whether the injured party is an employee? The petitioner respectfully submits that these are questions which should be addressed by this Court.

The practical implications of the Alabama Supreme Court's decision in *Coffee* create a compelling reason for this Court to review this decision. Switching railroad cars on sidings and sidetracks is the very essence of the railroad employee's job. If the *Coffee* decision goes uncorrected, railroads will effectively be able to avoid their liability to their employees under the FELA simply by entering into contractual agreements with industries delegating the maintenance of the sidetracks to those industries. The nondelegable duty has suddenly become delegable.

It is equally important to note that the practical result of the *Coffee* decision is to leave Coffee and similarly situated individuals *without a remedy*. A potential cause of action against a third party is either inadequate or nonexistent. For example, in the present case, Coffee and his fellow crew members were aware of the dangerous conditions and had tried unsuccessfully to get the railroad to correct them. Under FELA, assumption of the risk is not a defense. 45 U.S.C. § 54. Likewise, contributory negligence is not a bar to recovery. 45 U.S.C. § 53. However, if the *Coffee* decision is allowed to stand, and the plaintiff is

required to look to the third party industry for a recovery under Georgia law, both assumption of risk and contributory negligence would be valid defenses.

Finally, if the railroad is allowed to delegate what has heretofore been considered a nondelegable duty, the safety of railroad employees will undoubtedly be affected. Indeed, the facts of the *Coffee* case present a clear view of what the future might hold. There is no dispute in the *Coffee* case that railroad officials were fully aware of the dangerous condition on the premises of Jessie Morie. Yet, because of its third party contract, the railroad took no actions, or even felt the need to take any actions to protect the safety of its employees. As a result, Coffee has been permanently disabled. Quite clearly, this is an appropriate case for the United States Supreme Court to review.

CONCLUSION

The decision of the Alabama Supreme Court in this case is simply wrong. The Court's analysis was faulty. It relies on *Ward,* which involved the question of who is an employee even though the issue in the present case is who is an agent. It has allowed a railroad to freely delegate away a fundamental duty which the railroad owes to its employees, even though that duty has repeatedly been held to be nondelegable. Finally, it has paved the way for a seriously injured and disabled railroad employee to go uncompensated even though the circumstances are such that compensation is clearly called for by the Federal Employers' Liability Act.

In addition to correcting the grievous injustices in Mr. Coffee's case, review of this case by the United States Supreme Court will provide an opportunity to correct the misconceptions and clarify the confusion which has attended this issue over the past thirty years.

The writ of certiorari should be granted.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been served upon all parties required to be served: W. J. McDaniel and Robert S. W. Given, McDaniel, Hall, Conerly & Lusk, P.C., 1400 Financial Center, Birmingham, Alabama 35203; Walter R. Byers, Steiner, Crum & Baker, P.O. Box 668, Montgomery, Alabama 36101, by forwarding three (3) copies thereof through the United States mail, first-class postage prepaid and properly addressed, on this 15th day of August, 1990.

FRANK O. BURGE, JR.
Counsel for Plaintiff

APPENDIX

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1989-90

88-316

Seaboard System Railroad, Inc.

v.

Richard Coffee

Appeal from Jefferson Circuit Court
(CV-84-0776)

ALMON, JUSTICE.

This is an appeal from a judgment on a jury verdict awarding the plaintiff $1,554,000 in an action under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"). Richard Coffee, an employee of Seaboard System Railroad, was injured as he stepped off Seaboard's train onto property owned and operated by the Jesse Morie Sand Company ("Morie Sand"). The questions presented here are whether the trial court properly instructed the jury that any negligence by Morie Sand that proximately caused Coffee's injury would be imputed to Seaboard and whether the damages were excessive.

This case has been appealed once before, and in that first appeal the new trial order by the trial court was affirmed because Coffee's attorney had made a reference in the first trial to an indemnity agreement between Seaboard and Morie Sand. *Coffee v. Seaboard System R.R.*, 507 So. 2d 476 (Ala. 1987).[1]

The evidence showed that Coffee's injury occurred on Morie Sand's property near Brown Sands, Georgia. Morie

[1]Although the previous opinion spelled the sand company's name as "Jessie Morie," the record before us indicates that the correct spelling is "Jesse Morie."

Sand's property is in an area of fine sand that was described as extending in a five-mile radius around Morie Sand's property. Coffee's injury occurred when he stepped from the train into the sand adjoining Morie Sand's sidetrack. His foot struck a broken piece of a lever called an "inch bar," causing his knee to fracture and to tear tendons. The evidence indicated that Morie Sand's employees used inch bars to move railroad cars short distances on the track while loading sand into them, but that Seaboard's employees were not issued and did not use inch bars. Thus, the evidence would support a finding that a Morie Sand employee negligently left the broken piece of inch bar beside the track and that it became buried in sand and proximately caused Coffee's injury.

The trial court instructed the jury:

> "The defendant [Seaboard] was not a guarantor or insurer of the safety of the place to work. The extent of the defendant's duty was to exercise reasonable care under the circumstances at the time and place in question to provide the plaintiff a reasonably safe place to work.
>
> "Now the railroad does have a non-delegable duty to provide its employees with a safe place to work despite the fact that it may not own, control, or be under a primary obligation to maintain premises on which the employee is injured. The railroad is not relieved from liability because such premises are unsafe or because [of] the existence of an unsafe condition brought about through the act of another and without the fault of the railroad. In other words, what I'm saying, if you found that the plaintiff in this case was injured as a result of the negligence on the part of the industry in question, the Jesse Morie Sand Company, or some of its employees, then that negligence would be imputed to the railroad defendant here.
>
> "....

> "Now, I've already explained to you the relationship between any negligence on the part of Jesse Morie's employees and the railroad by saying that the negligence on the part of those employees, if you found that they were negligent, would be imputed to the defendant."

Seaboard objected to these instructions, noting that an extensive charge conference had been held, and reiterating its objections "on the basis that the negligence is not, as a matter of law, imputed to the railroad." Seaboard argued:

> "The duty of the railroad is to provide a safe place to work. However, it is not responsible for the negligence of others. It simply . . . may be evidence that bears on its own negligence. But the negligence of it is not imputed, certainly not imputed to them unless that person, or by some reason the agents of the railroad that is fulfilling an operational activity of the railroad such as switching cars and words to that effect [sic]."

The gist of Seaboard's argument is that it cannot be held liable under the FELA unless its officers, agents, or employees negligently failed to provide a safe place for Coffee to work, and that neither Morie Sand nor any of its employees was Seaboard's agent under the facts and the applicable law. It states the issue: "Whether the trial court incorrectly charged the jury that the negligence of an independent sidetrack operator is to be imputed to the railroad without qualification."

Coffee counters principally by reliance on *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326 (1958). Sinkler was injured while working on a Missouri Pacific train through the negligence of a switching crew working for the Houston Belt & Terminal Railway Company (the "Belt Railway"). The Court held that "an accommodating scope must be given to the word 'agent' " as used in the FELA, 356 U.S. at 330-31, and that the Belt Railway, in switching cars on Missouri Pacific's train, was performing "operational activi-

ties" of Missouri Pacific and thus was acting as an agent of Missouri Pacific. Stating its holding generally, the Court wrote: "when a railroad employee's injury is caused in whole or in part by the fault of others performing, under contract, operational activities of his employer, such others are 'agents' of the employer within the meaning of § 1 of FELA." 356 U.S. at 331-32.

Coffee points to the contract between Seaboard and Morie Sand, in which Morie Sand agreed to maintain the sidetrack to the satisfaction of Seaboard's chief engineer and to give Seaboard exclusive use of the sidetrack. In the contract, Morie Sand agreed "to keep the right-of-way of said sidetrack free and clear of all commodities, rubbish, trash, or other objects which may be hazardous or dangerous to those engaged in the operation of the Railroad." Coffee argues that " 'Right-of-way' obviously refers to the track and adjacent walkways of those engaged in the operation of the railroad," that the maintenance duties to which Morie Sand agreed are operational activities of Seaboard, and, thus, that in performing those activities, Morie Sand was acting as an agent for Seaboard.

Coffee's contention has been answered by the United States Supreme Court, however, in *Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396 (1960). Ward, an employee of Atlantic Coast Line, was injured while working on his day off on a sidetrack owned by the M. & M. Turpentine Company.

> "That company had an agreement with the railroad calling for the railroad to make periodic inspections of the track and for the repairs disclosed to be necessary by such inspections to be made by and at the expense of the Turpentine Company 'to the satisfaction of the [railroad's] Chief Engineer.' When an inspection revealed the need for the work in question, the Turpentine Company engaged the petitioner's foreman to recruit his crew to do the work on their day off under his direction. The foreman offered the crew railroad overtime

rates of pay for doing the work, but there is a sharp conflict in the evidence whether he told the crew that they would not be working for the railroad but for someone else. The foreman paid the wages with funds supplied to him by the Turpentine Company.

"The petitioner contends that the proofs require a holding as a matter of law that the Turpentine Company, in the maintenance of the siding, was the 'agent' of the respondent railroad within the meaning of § 1 of the [FELA], as we construed that term in [*Sinkler*]. We find no merit in this contention. Indeed, we do not think that the proofs presented a jury question whether the Turpentine Company was the railroad's 'agent' within the meaning of the Act. This was not a situation, as in *Sinkler*, in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise. This was a siding privately owned by the Turpentine Company and established to service it alone. In maintaining it, we do not see how it can be said under the proofs that the Turpentine Company was 'engaged in furthering the operational activities of respondent.' [*Sinkler*, at 331]."

362 U.S. at 397-98.[2]

The above-quoted portion of *Ward* is on all fours with this case. In maintaining its own sidetrack, Morie Sand was no more an agent of Seaboard than the Turpentine Company was an agent of Atlantic Coast Line in main-

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[2]The Court proceeded to reverse the judgment for Atlantic Coast Line on Ward's alternative argument that the trial court erred in refusing Ward's requested jury instructions that would have allowed the jury to find, from all of the circumstances, that Ward was injured during the course of his employment with Atlantic Coast Line and through Atlantic Coast Line's negligence, apparently on the theory that the jury could have found, under proper instructions, that Ward's

taining its own sidetrack. Coffee cites a number of Federal circuit and district court cases as following *Sinkler* and as supporting the challenged instructions in this case.[3] Suffice it to say that none of those cases could supersede the dispositive holding in *Ward* and, in any event, they are for the most part distinguishable. The only United States Supreme Court case subsequent to *Ward* that the parties cite as being instructive on the issue before us is *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1 (1963), and that case does not overrule the pertinent holding in *Ward* or apply nearly so directly to this case as *Ward* does. Our research has not disclosed any United States Supreme Court case overruling *Ward* or limiting the extent to which it disposes of the issue before us.

Under the holding in *Ward, supra,* the trial court erred in giving the instructions made the subject of this appeal. Therefore, the judgment is reversed and the cause is remanded. It is thus unnecessary to consider the second issue presented, regarding whether the damages awarded were excessive.

REVERSED AND REMANDED.

Hornsby, C. J., and Maddox, Adams, and Steagall, JJ., concur.

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foreman had effectively hired the crew to work overtime for Atlantic Coast Line. That aspect of *Ward* does not support the trial court's instructions in this case or undermine the extent to which the quoted portion of *Ward* is dispositive of this case, because there is no evidence that Seaboard employees performed maintenance for Morie Sand.

[3]E.g., *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963); *Carter v. Union R.R.*, 438 F.2d 208 (3d Cir. 1971); *Nivens v. St. Louis Southwestern R.R.*, 425 F.2d 114 (5th Cir.), *cert. denied*, 400 U.S. 879 (1970); and *Carney v. Pittsburgh & Lake Erie R.R.*, 316 F.2d 277 (3d Cir.), *cert. denied*, 375 U.S. 814 (1963). Cf. *Pyzynski v. Pennsylvania Central Trans. Co.*, 438 F. Supp. 1044 (W.D.N.Y. 1977), cited by Seaboard as supporting its position and as disapproving of *Payne*, the case most strongly tending to support Coffee's argument.

(2)

No. 90-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD COFFEE,
Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the court below, relying on *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960), correctly hold, in an action brought under the Federal Employers' Liability Act, that negligence of an independent sidetrack owner in the maintenance of its own sidetrack may not be imputed to the railroad?

CERTIFICATE OF INTERESTED PARTIES

Counsel of record for Respondent Seaboard System Railroad, Inc., in accordance with Rule 29.1 of the Supreme Court of the United States, certifies that in addition to the parties listed by Petitioner, the following listed parties may have an interest in the outcome of this case:

1. CSX Corporation (parent of CSX Transportation, Inc., the successor to Seaboard System Railroad, Inc., by corporate merger).

The following non-wholly owned subsidiaries of CSX Transportation, Inc.:

2. The Akron and Barberton Belt Railroad Company
3. The Akron Union Passenger Depot Company
4. Allegheny and Western Railroad Company
5. Augusta and Summerville Railroad Company
6. Central Florida Pipeline Corporation
7. The Central Rail Road Company of South Carolina
8. Central Transfer Railway and Storage Company
9. Charlotte Docks Company
10. Chatham Terminal Company
11. Chicago and Western Indiana Railroad Company
12. Clearfield and Mahonng Railway Company
13. The Cleveland Terminal & Valley Railroad Company
14. Dayton and Michigan Railroad Company
15. Dayton and Union Railroad Company
16. Delaware and Bound Book Railroad Company
17. The Home Avenue Railroad Company
18. The Lakefront Dock and Railroad Terminal Company
19. The Monogahel Railway Company

20. Nicholas, Fayette and Greenbriar Railroad Company
21. Norfolk and Portsmouth Belt Line Railroad Company
22. North Charleston Terminal Company
23. Paducah & Illinois Railroad Company
24. Richmond-Washington Company
25. RF&P Corporation
26. Terminal Railroad Association of St. Louis
27. Trailer Train Company
28. Winston-Salem Southbound Railway Company
29. Woodstock & Blocton Railway Company

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TABLE OF AUTHORITIES

No. 90-301

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD COFFEE,
Petitioner,

vs.

SEABOARD SYSTEM RAILROAD, INC.,
Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Seaboard System Railroad, Inc. respectfully urges that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Alabama dated March 30, 1990, and made final on May 18, 1990.

OPINION BELOW

The opinion of the Alabama Supreme Court has not been published in the official reporter but appears as Appendix A to the Petition.

JURISDICTION

Jurisdiction of this Court to review by writ of certiorari is conferred by 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 45 U.S.C. § 51 are contained in the petition. Although the petition asserts that 45 U.S.C. § 53 and 45 U.S.C. § 54 are involved, issues relating to those statutes were neither considered nor briefed in the court below.

STATEMENT OF THE CASE

Respondent refers to the opinion of the Alabama Supreme Court which appears in petitioner's appendix.

The factual statement in the petition is misleading, inaccurate and varies substantially[1] from the relevant facts of record as found by the court below, which findings are adopted by respondent, as follows:

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[1] Petitioner and his co-workers testified, over objection, that at other times they were unable to work at the sidetrack owned by Morie Sand because of sand piled upon its private sidetrack, and that they had complained of this condition. Respondent's trainmaster testified that no employee of Seaboard complained to him about the sand, and further, that removing sand from the sidetrack did not change the condition of the sand alongside the tracks, the removal of which would be uncovering only other sand — "sand on top of sand." Respondent disputes that "the railroad readily acknowledged the condition and the danger" "repeatedly reported" to it. Moreover, prior conditions of sand accumulating on the track were not the proximate cause of Coffee's accident and injury (which occurred because of an object buried in the sand adjoining the track), and any evidence relating to those prior conditions was irrelevant, prejudicial and due to be excluded upon the objections properly interposed. However irrelevant, piles of sand on the sidetrack rails were but an attempt to bring *Coffee* in factual harmony with *Payne v. Baltimore & Ohio Railroad Co.*, 309 F.2d 546 (6th Cir. 1962), *cert. denied*, 374 U.S. 827 (1963), where a train was derailed by a pile of ashes on the sidetrack rails.

"The evidence showed that Coffee's injury occurred on Morie Sand's property near Brown Sands, Georgia. Morie Sand's property is in an area of fine sand that was described as extending in a five-mile radius around Morie Sand's property. Coffee's injury occurred when he stepped from the train into the sand adjoining Morie Sand's sidetrack. His foot struck a broken piece of a lever called an 'inch bar,' causing his knee to fracture and to tear tendons. The evidence indicated that Morie Sand's employees used inch bars to move railroad cars short distances on the track while loading sand into them, but that Seaboard's employees were not issued and did not use inch bars. Thus, the evidence would support a finding that a Morie Sand employee negligently left the broken piece of inch bar beside the track and that it became buried in sand and proximately caused Coffee's injury.

Based on these facts, the trial court below properly instructed the jury that the railroad had a *non-delegable* duty to provide its employees with a reasonably safe place to work; but erroneously instructed the jury that any negligence of Morie Sand in failing to maintain its own sidetrack, as required by its contract with the railroad, would be *imputed* to the respondent railroad.

The full text of the pertinent jury instruction is shown in the opinion of the Alabama Supreme Court:

"The trial court instructed the jury:

'The defendant [Seaboard] was not a guarantor or insurer of the safety of the place to work. The extent of the defendant's duty was to exercise reasonable care under the circumstances at the time and place in question to provide the plaintiff a reasonably safe place to work.

'Now the railroad does have a non-delegable duty to provide its employees with a safe place to work despite the fact that it may not own, control, or be under a primary

> obligation to maintain premises on which the employee is injured. The railroad is not relieved from liability because such premises are unsafe or because [of] the existence of an unsafe condition brought about through the act of another and without the fault of the railroad. In other words, what I'm saying, if you found that the plaintiff in this case was injured as a result of the negligence on the part of the industry in question, the Jesse Morie Sand company, or some of its employees, then that negligence would be *imputed* to the railroad defendant here.
>
> '. . . .
>
> 'Now, I've already explained to you the relationship between any negligence on the part of Jesse Morie's employees and the railroad by saying that the negligence on the part of those employees, if you found that they were negligent, would be *imputed* to the defendant.' [Emphasis added][2]

"Seaboard objected to these instructions, noting that an extensive charge conference had been held, and reiterating its objections 'on the basis that the negligence is not, as a matter of law, imputed to the railroad.' Seaboard argued:

> 'The duty of the railroad is to provide a safe place to work. However, it is not responsible for the negligence of others. It simply . . . may be evidence that bears on its own negligence. But the negligence of it is not imputed, certainly not imputed to them unless that person, or by some reason the agents of the railroad that is fulfilling an operational activity of the railroad such as switching cars and words to that effect [sic]' "

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[2] The irreparable damage caused by this erroneous jury instruction was exacerbated by petitioner's jury argument emphasizing on more than one occasion that Morie Sand's negligence would be imputed to the respondent railroad.

On appeal, the Alabama Supreme Court relying on this Court's decision in *Ward v. Atlantic Coast Line Railroad Co.*, 362 U.S. 396 (1960) held that Morie Sand was not an agent of respondent Seaboard stating:

> "In maintaining its own sidetrack, Morie Sand was no more an agent of Seaboard than the Turpentine Company was an agent of Atlantic Coast Line in maintaining its own sidetrack." (Petition, A-5 - A-6)

This holding did not fail to recognize the railroad's *non-delegable* duty to provide a safe place to work. It simply followed this Court in holding that an independent sidetrack owner, in the maintenance of its own sidetrack (even under contract with the railroad), was not the "agent" of the respondent railroad within the meaning of § 1 of the FELA[3]; therefore, its negligence, if any, properly could not be imputed to respondent railroad.

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[3] 45 U.S.C. § 51

REASONS FOR DENYING THE WRIT

1. The Alabama Supreme Court properly followed and applied this Court's decision in *Ward*. Not satisfied in proceeding under the theory of *non-delegable* duty of the railroad to provide its employees with a safe place to work, petitioner "gilded the lily" by requesting an improper instruction that any negligence on the part of Morie's employees would be imputed to the railroad. The trial court below erroneously instructed the jury in this regard.

The trial court, at petitioner's insistence, failed to distinguish between the "safe place to work" theory which relates to the direct negligence of the railroad in failing to use reasonable care to furnish a reasonably safe place to work — whether on or beyond its premises;[4] and the separate theory of vicarious liability of the railroad for acts of third persons under the definition of "agents" expanded to include persons engaged by the railroad by contract to conduct "part of the operational activities of the railroad."[5]

Petitioner erroneously attacks the decision of the Alabama Supreme Court as "not only in direct conflict with the decisions of the Federal Appellate Courts, but it flies in the face of the most fundamental precepts of the Federal Employers' Liability Act." This ignores the fact that the Alabama Supreme Court relied upon and quoted at length from this Court's decision in *Ward*, which the court below correctly found to be "on all fours with this case." The quoted principle enunciated in *Ward* was the very basis for the decision of the Alabama Supreme Court.

While this *Coffee* decision in some respects may be inconsistent with the decision of the 6th Circuit in *Payne v. Baltimore &*

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[4] *Shenker v. Baltimore & Ohio R. R. Co.*, 374 U.S. 1 (1963).

[5] *Sinkler v. Missouri Pacific R. R.*, 356 U.S. 326 (1958).

O. R. Co., 309 F.2d 546 (1962), *cert. denied*, 374 U. S. 827 (1963), *Payne* insofar as it deals with imputed negligence of an independent sidetrack owner is in conflict with *Ward*.[6] See *Pyzynski v. Pennsylvania Central T. Co.*, 438 F.Supp. 1044, 1048 (W.D.N.Y. 1977) ("our highest court has ruled otherwise").

2. Petitioner has failed to present any "special or important reasons" for the granting of certiorari and has failed to invoke any of the criteria specified in Supreme Court Rule 10.1;[7] the state court of last resort has decided a federal question, settled by this Court, and specifically followed this Court's decision in *Ward*.

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[6] Actually, *Payne* was decided under the direct negligence theory of *non-delegable* duty to maintain a safe place to work. See *Epling v. M. T. Epling Company*, 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied*, 401 U.S. 963 (limited to certain "safe place to work" cases). That court confused the issue by its unnecessary dictum relating to vicarious liability: "There is ε· ϶le basis in the record to sustain the jury's finding of liability regardless of which of the two theories it may had proceeded under, that of independent negligence or that of *imputed* negligence." And further, "if it [the jury] found liability by virtue of *imputing* the negligence of SUCO to defendant, based on defendant's non-delegable duty regarding safety for its employees, the verdict is sound." 309 F.2d at 549. In *Pyzynski* (438 F.Supp at 1047-49), *Payne* was severly criticized and found to have been "limited by its patron tribunal": "The [*Payne*] decision itself was not unanimous and the denial by the United States Supreme Court of the application for writ of certiorari is of no authorative or precedential value. . . . Putting *Payne* aside — which I do — the 'bottom line' herein is that, unless the performance of an operational activity of the railroad is contractually left to another, there is no room for imputation of the other's negligence to the railroad. . . ." As pointed out in *Pyzynski*, the 6th Circuit through *Payne* and its progeny, in imputing negligence unless "the performance of an operational activity of the railroad is contractually left to another" (438 F.Supp at 1049), simply is erroneously out of step with this Court's decision in *Ward*.

[7] Rule 10.1 (a) is inapplicable.

Petitioner contends that *Ward* "had nothing to do with whether or not the negligence of a third party would be imputed to the railroad" and that confusion between the "operational activities" decisions of federal appellate courts following *Sinkler* and *Shenker* "arises from the decision of this Court in *Ward*. . . ." Neither contention is correct.

This Court in *Ward*, granted certiorari "to consider the issues presented in the light of our decisions in *Sinkler v. Missouri Pacific R. Co.*, 356 U.S. 326 and *Baker v. Texas & P. R. Co.*, 359 U.S. 227", recognizing that there were two issues for decision: (1) whether the proof required a holding that the sidetrack owner, "in the maintenance of the siding, was the 'agent' of the respondent railroad within the meaning of § 1 of Federal Employers' Liability Act, 45 U.S.C. § 51, as we construed that term in *Sinkler* . . ."[8] and (2) the alternative contention that the trial judge erred in refusing to instruct the jury "as to the factors to be considered by the jury in determining whether the petitioner was an 'employee' of the railroad during the performance of the work within the meaning of the Act."[9] This Court answered the primary contention by holding that the independent sidetrack owner was not the railroad's "agent" within the meaning of the Act, but reversed because the jury instruction did not provide the relevant factors set forth in *Baker* upon which to determine whether petitioner was a railroad "employee". Two issues were presented and decided on their merits; not just the one issue relating to "employee" as urged by petitioner. In *Coffee*, the Alabama Supreme Court followed this Court's ruling on the primary contention in *Ward* — the independent sidetrack owner was not the railroad's "agent" within the meaning of the FELA; accordingly, any negligence of the sidetrack owner could not be *imputed* to the respondent.

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[8] 362 U.S. at 398.

[9] *Id.* at 398-9.

Ward is not confusing and does not create confusion between the "operational activities" decisions of the federal appellate courts. *Ward* is fundamentally sound and embraces the most fundamental precept of the FELA: The FELA makes the employer railroad liable only for those injuries to its employees inflicted by the negligence of its "officers, agents, or employees." 45 U.S.C. § 51; *Sinkler,* 356 U.S. at 328-29. Only where the railroad has delegated, by contract, its "operational activities" to another does the other become an "agent" of the railroad whose negligence vicariously is imputed to the railroad. *Sinkler,* 356 U.S. at 331-32 After consideration of *Sinkler* and its expanded "agency" principle, *Ward* specifically held: "In maintaining it [privately owned siding], we do not see how it can be said under the proofs that the [siding owner] was 'engaged in furthering the operational activities of the respondent' [railroad]." 362 U.S. at 397-98. The railroad there and here had no duty to maintain a private sidetrack; its only duty was not to cause its employees to work there if the sidetrack was not a "safe place to work." Imputation of negligence had no place under the facts in *Ward* and has no place under the facts in *Coffee.*

There is no confusion on the issues of "agency" and imputed negligence except for *Payne* and its progeny within the 6th Circuit, which directly conflict with this Court's decision in *Ward. Ward* is neither overruled nor modified by, nor inconsistent with *Shenker,* or *Hopson v. Texaco,* 383 U.S. 262 (1966). *Shenker* relates solely to the safe place to work direct negligence theory, while *Ward* relates to vicarious liability resulting in imputation of the negligence only of an "agent" of the railroad. *Hopson* involved ill seamen[10] who were injured due to the negligence of a taxicab driver which the shipowner chose to

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[10] *Hopson* was brought under the Jones Act (46 U.S.C. § 688) which incorporates the standards of the FELA rendering an employer liable for the injuries negligently inflicted upon its employees by its "officers, agents or employees." 45 U.S.C. § 51.

carry out its statutory duty to take these seamen to the United States Consul for their return to the United States. Clearly, the cab driver was an "agent" "performing, under contract, operational activities" of the shipowner — the statutory duty to deliver the ill seamen to the Consul to arrange their return to the United States. The *Hopson* facts are clearly distinguishable from those in *Ward*. Likewise, there is no confusion in or caused by *Carney v. Pittsburgh & Lake Erie Railroad Co.*, 316 F.2d 277 (3rd Cir. 1963), *cert. denied*, 375 U.S. 814 (1963) and *Moore v. Chesapeake & Ohio Railway Co.*, 493 F.Supp. 1252 (S.D.W.Va. 1980). As observed in *Thomas v. Grigorescu*, 582 F.Supp. 514 (S.D.N.Y. 1984):

> "In each of these cases, as in *Sinkler*, the negligent party was operating under a contract with the plaintiff's employer. This is a critical feature of liability, for it is the contract which permits a finding that the negligent party was the 'agent' of the employer. In the absence of such a contract, there is no basis for liability under the FELA. *See, e.g. Epling v. M. T. Epling Company*, 435 F.2d 732, 736 (6th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971) . . . ."

In *Carney*, the railroad had a contractual arrangement with the YMCA to provide, at the railroad's expense, room and board for the railroad's employees who are working away from home; and in *Moore*, the railroad had a written contract with a third party to operate a cafeteria on the railroad's premises for use of only railroad employees and their guests. The *Thomas* observation is equally applicable to *Carter v. Union Railroad Co.*, 438 F.2d 208 (3rd Cir. 1971). In *Carter*, a third party, pursuant to a written letter agreement with the railroad, furnished a parking lot for the use of the railroad's employees. In each of these cases, a contract or agreement in writing was present, and based on such contract the courts decided in each case that the third party was "performing, *under contract*, operational activities of [the] employer," and was an "agent" of the railroad under the expanded definition of "agent" in *Sinkler*, 336 U.S. at 331-32.

Not so in *Ward*. Although there was a contractual obligation by the sidetrack owner to maintain its privately owned sidetrack in accordance with the railroad's standards, this Court held that the sidetrack owner was not "performing, under contract, operational activities" of the railroad. This Court held that the sidetrack owner not only was not the "agent" of the railroad as a matter of law, but "we do not think that the proofs presented a jury question whether [the sidetrack owner] was the railroad's 'agent' within the meaning of the [FELA] Act." The Court concluded "we do not see how it can be said under the proofs the [sidetrack owner] was 'engaged in furthering the operational activities of respondent [railroad].' " 362 U.S. at 397-98. Such also is the case in *Coffee*. and the Alabama Supreme Court in *Coffee* correctly followed *Ward* in denying the imputation of the negligence of the sidetrack owner to the railroad under facts which were substantially identical to those in *Ward*. In both *Ward* and *Coffee,* there was no duty on the part of the railroad to maintain the privately owned sidetrack; that was the duty of the sidetrack owner. Therefore, "operational activities" of the railroad were not involved.

3. Petitioner Coffee is not, as erroneously contended, left *without a remedy*. Coffee has a cause of action against respondent Seaboard for failure to perform its *non-delegable* duty to provide Coffee with a safe place to work. If indeed the facts are as petitioner contends, petitioner has an adequate remedy against respondent Seaboard under the FELA.

CONCLUSION

The decision of the Alabama Supreme Court in this case is eminently correct. That Court's analysis and decision were dictated by this Court's decision in *Ward*.

Accordingly, petitioner has failed to advance any reason for the grant of certiorari and, for the foregoing reasons, his petition is due to be and should be denied.

Respectfully submitted,

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By /s/ Walter R. Byars
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CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Brief of Respondent in Opposition upon counsel of record for Petitioner by depositing three copies in the United States Mail, first-class postage prepaid, and properly addressed, as follows:

Frank O. Burge, Jr., Esq.
Burge & Wettermark, P.C.
2300 South Trust Tower
Birmingham, Alabama 35203

This 10th day of September, 1990.

/s/ Walter R. Byars
Counsel of Record for Respondent